88-11

No.

IN THE
SUPREME COURT OF THE UNITED STATES

MARTIN E. O'MALLEY

Petitioner

vs.

XEROX CORPORATION; LORAL ELECTRO-OPTICAL SYSTEMS; THOMAS MASON; and STANLEY HARTMAN

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Attorney for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

A. Is the Congressional assignment of subject matter jurisdiction of actions brought by a relator under the False Claims Amendments Act of 1986 to the Attorney General an unconstitutional delegation of judicial power to the executive branch?

B. Do the provisions of 31 U.S.C. § 3730)b)(1) preclude dismissal of relator's action under the False Claims Amendments Act of 1986 by a District Court without the consent of the Attorney General?

C. Did the dismissal of the original "qui tam" action by the District Court for the Central District of California require the consent of the Attorney General?

D. Did the defendant Xerox Corporation have standing to bring an action to dismiss and for sanctions during the period in which relator's complaint should have been held by the Clerk of the Court "in camera?"

E. Was relator denied due process when the U. S. Attorney failed to comply with the False Claims Amendments Act of 1986?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings in the United States Supreme Court other than those set forth in the caption of the case before this Court.

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TABLE OF AUTHORITIES

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARTIN E. O'MALLEY,
Petitioner,

vs.

XEROX CORPORATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Martin E. O'Malley, respectfully prays that a writ of certiorari issue to review the decision of the 4th Circuit Court of Appeals affirming the decision of the U. S. District Court for the Eastern District of Virginia, at Alexandria, entered on May 9, 1988.

I.

OPINIONS BELOW

The affirmation of the United States Court of Appeals, unpublished, is printed in Appendix A hereto. The Order Dismissing Complaint of the United States District Court for the Central District of California is printed in Appendix B hereto. The Order of Dismissal of the United States District Court of the Central District of California is printed in Appendix C hereto. The Relator's Response to Defendants' Motion to Dismiss and for Sanctions is printed in Appendix D hereto. The July 10, 1987, Order of the United States District Court for the Eastern District of Virginia is printed in Appendix E hereto. The

September 9, 1987, Order of the United States District Court for the Eastern District of Virginia is printed in Appendix F hereto. The Informal Brief of Amicus Curiae, the United States of America, filed by the United States Attorney on September 10, 1987, is printed in Appendix G hereto. The United States Opposition to Dismissal of Action, originally filed by the United States Attorney on September 26, 1985, is printed in Appendix H hereto.

II.

JURISDICTION

The affirmation of the orders of the U. S. District Court for the Eastern District of Virginia was issued by the United States Court of Appeals for the Fourth Circuit on May 9, 1988. The

jurisdiction of the United States Supreme Court is invoked under Article 3, Sections 1 and 2, and Article 5 of the Constitution of the United States.

III.

STATUTES INVOLVED

The Federal False Claims Act of 1863, 31 U.S.C. §§231-235.

The False Claims Amendment Act of 1986, 31 U.S.C. §3730.

The Federal Declaratory Judgment Act (1934), 28 U.S.C. §2201.

The United States Constitution, Article 3, Section 1; Article 3, Section 2, Clause 1; and Article 5.

IV.

STATEMENT OF THE CASE

(Original Cause of Action)

On July 10, 1985, petitioner filed a Qui Tam action on behalf of the United States against Xerox Corporation for a violation of the False Claims Act.

Or or about August 5, 1985, Xerox filed a motion to dismiss the action.

On or about September 13, 1985, the U. S. Attorney filed a Notice of Declination of Appearance of the United States stating, however:

> "Therefore, if the relators or the defendant propose that this action be dismissed, settled, or otherwise discontinued, we respectfully request that this court first solicit the consent of the United States through the undersigned attorneys of the United States Department of Justice before dismissing this action."

On or about September 27, 1985, the United States Attorney filed the

United States' Opposition to Dismissal of the action, stating:

> "Accordingly, without regard to whether the plaintiff here has pleaded actual damage to the government, the complaint states a claim upon which relief may be granted, because there exists a cause of action under the False Claims Act for at least one $2,000 penalty."

In a hearing held on September 30, 1985,the Honorable Judge Tashima dismissed the complaint.

On or about October 2, 1985, the U. S. Attorney filed a Supplemental Submission in opposition to the dismissal.

On October 4, 1985, the District Court dismissed the complaint but granted 30 days leave to amend.

On October 31, 1985, petitioner filed a First Amended Complaint for Damages: Fraud--Submission of False Claims.

On or about November 22, 1985, Defendant filed a Motion to Dismiss for Failure to State a Claim.

On or about January 17, 1986, the U. S. Attorney filed a Second Notice of Declination of Appearance of the United States. The U. S. Attorney stated:

> "Although the United States is declining to enter its appearance in this action, the Court is respectfully referred to 31 U.S.C. §3730(b)(1), which provides that the relators may carry on the action in the name of the United States, but that a(n) action may be dismissed only if the court and Attorney General give written consent and their reasons for consenting.

"Defendant Xerox Corporation has filed a motion dated November 22, 1985, to dismiss the amended complaint. We intend to file a renewed opposition to this dismissal (asserting essentially the same arguments made in our opposition filed September 27, 1985, to Xerox's prior motion to dismiss the original complaint) within 20 days of the filing of this declination."

The action was heard on February 3, 1986.

On or about February 11, 1986, the U. S. Attorney filed the United States' Response to Defendant's Motion for Dismissal of Action. The U. S. Attorney stated:

"If the Court finds that, as a matter of law, the plaintiff has failed to state a claim for which relief can be granted, we do not object to the dismissal of the action. However, in considering the motion, we wish to draw the Court's attention to our argument contained in the United States' Opposition to Dismissal of Action filed

September 27, 1985 (Attachment A), directed to defendant's prior motion to dismiss."

On February 12, 1986, Judge Tashima dismissed petitioner's cause of action.

STATEMENT OF THE CASE

(Present Cause of Action)

Based upon information received from the United States Navy under the provisions of the Freedom of Information Act, petitioner filed a complaint alleging a conspiracy to violate the False Claims Act. The complaint was filed on or about June 3, 1987 in the U. S. District Court for Eastern Virginia, in Alexandria.

Or or about June 23, 1987, Xerox Corporation filed a Motion to Dismiss and for sanctions. Hearing was set for July 10, 1987.

On July 6, 1987, petitioner filed Relator's Response to Defendants' Motion to Dismiss and for Sanctions,

challenging the subject matter jurisdiction of the District Court.

On July 10, 1987, Vincent B. Terlep filed Notice of Declination of Appearance of the United States, stating:

> "If the Court finds, as a matter of law, that defendant Xerox's motion should be granted, this is to advise the Court that the United States does not object to the dismissal of the action."

On July 10, 1987, Judge Bryan issued the Order dismissing the action in this case, denying sanctions.

On July 23, 1987, petitioner filed a Motion to Alter Order.

On September 4, 1987, Judge Bryan took the Motion to Alter Order under advisement. On September 9, 1987, Judge Bryan found that "the type of

dismissal granted by the United States district Court for the Central District of California on February 12, 1986, did not require the consent of the Attorney General." Judge Bryan then denied the Motion to Alter Order.

In its decision to petitioner's appeal, the U. S. Court of Appeals for the Fourth Circuit did not discuss petitioner's basis for appeal, the lack of subject matter jurisdiction. The Court essentially confirmed Judge Bryan's ruling that Judge Tashima did not require the consent of the U. S. Attorney General to dismiss the complaint.

V.

ARGUMENT

A. The False Claims Act (the "Act") assigns subject matter jurisdiction for Qui Tam actions brought on behalf of the United States to the U. S. District Court and the Attorney General.

The operative words in the Act are, "An action may be dismissed only if the court and Attorney General give written consent and their reasons for consenting." For more than 100 years, the Attorney General has decided the the question of a violation of the False Claims Act. If affirmative, the jurisdiction of the district court was limited to a determination of the amount of damages.

In his opposition to the dismissal, the position of the Attorney General is very cogently set forth in Appendix H. A document like Appendix H either in opposition to or consenting to the dismissal is required under the Act, and even more clearly, under the Amendments Act. Without the written consent of the Attorney General, the district court lacks subject matter jurisdiction to dismiss Qui Tam actions brought under the Act.

Despite the fact that the Attorney General opposed the dismissal, the District Court in Los Angeles, California dismissed the cause of action, with 30 days leave to amend (Appendix B). In more than 100 years, the district court in Los Angeles was the first court to

dismiss a complaint for violation of the False Claims Act after the U. S. Attorney had objected to the dismissal. The ruling, lacking subject matter jurisdiction, is a nullity and can be attacked collaterally at any time. In order to comply with the Court's ruling, petitioner/relator filed an action in fraud. The Attorney General requested an opportunity to intervene. On January 21, 1988, the Attorney General declined to enter an appearance, stating in part:

> "We intend to file a renewed opposition to the dismissal (asserting essentially the same arguments made in our opposition filed September 27, 1985, to Xerox's prior motion to dismiss the original complaint) within 2 days of this declination."

On February 12, 1986, the District Court issued Appendix C.

On June 2, 1987, a complaint alleging the conspiracy to violate the False Claims Act was filed inthe U. S. District Court in Alexandria, Virginia. The action was brought under the False Claims Amendments Act of 1986. The operative words assigning joint subject matter jurisdiction to the U. S. District Court and the Attorney General had been revised to read as follows:

> "The action may be dismissed only if the court and Attorney General give written consent to the dismissal and their reasons for consenting."

On June 23, 1987 Xerox filed a motion to dismiss and for sanctions. On July 6, 1987, petitioner filed Appendix D, "Relator's Response to Defendants' Motion to Dismiss and for Sanctions."

On July 10, 1987, a hearing was held in the District Court in Alexandria, Virginia. A partial transcript of the proceedings is set forth as follows:

> "THE COURT: Is Mr. O'Malley here? Then we can dispose of this in short order. The matter is either barred because of res judicata principles or statute of limitations or probably both. Do you want to be heard further on that?
>
> "MR. TERLEP: Your Honor, I handed to your clerk prior to this hearing this morning a notice of declination of appearance of the United States in this matter. This is a qui tam case brought under the false claims act. The United States can abate such a suit within 60 days. We've done that prior to the hearing on the motion.
>
> "THE COURT: All right. I'll prepare the order dismissing the case.

The court specifically stated in Appendix E, "that the provisions of 31

U.S.C. §3730(b)(1) do not preclude dismissal of this action."

On July 23, 1987, petitioner filed a Motion to Alter Order because he had been surprised by the ruling.

On September 4, 1987, a hearing was held in the District Court in Alexandria. A transcript of the proceeding is as follows:

> "THE CLERK: Civil Action No. 87-529-A, United States of America ex rel Martin E. O'Malley versus Xerox Corporation, et al.
>
> "THE COURT: I am not going to hear oral argument in that. I tried to get hold of you yesterday, sir, and the number you gave us you were not known at. I will rule on that on the submission.
>
> "MR. O'MALLEY: Yes, sir. I would only like to call the Court's attention to my answer to the motion to dismiss.
>
> "THE COURT: All right. I'll look at that.
>
> "MR. O'MALLEY: It's very much on point. Thank you.
>
> "THE COURT: All right.

"(Whereupon, the proceedings in the above-captioned matter were concluded.)"

On September 9, 1987, the District Court issued Appendix F, denying the motion to alter the order of dismissal and stating that the type of dismissal granted by the California court did not require the consent of the Attorney General.

On November 25, 1987, petitioner filed a Petition for a Writ of Certiorari in the United States Court of Appeals for the Fourth Circuit.

On December 10, 1987, the Attorney General Filed Appendix G, an Amicus Curiae brief. Mr. Terlep uses a 1944 case, U. S. ex rel. Laughlin v. Eicher to justify an action which directly contravenes the provisions of the

Amendments Act. In Laughlin, Judge Eicher had ruled that the refusal of an Acting Attorney General to enter the suit was tantamount to the United States Attorney's consent to dismiss the suit.

The present requirement of the Amendments Act requiring a written consent of the Attorney General "to the dismissal" overrules the decision in Laughlin v. Eicher.

The brief of defendant Xerox states: "It would make no sense to require a court to give written consent to its own order of dismissal, and it would violate the Constitution to require a court to obtain the consent of the Attorney General before dismissing an action on legal grounds."

The lower courts have no powers delegated to them in the Constitution. In fact, the lower courts are never mentioned in the Constitution. The lower federal courts exist only at the whim of Congress. All powers and jurisdiction of the lower courts are those delegated to them by Congress. We have a situation wherein Congress has specifically directed the lower courts not to dismiss an action without the written consent of the Attorney General, and further, after receiving that consent to dismiss, that the court must provide its reasons for dismissal in writing.

Since this lower court did not have the written consent of the Attor-

ney General, it was powerless to dismiss this action.

B. A defendant in a Qui Tam action under the False Claims Amendment Act of 1986 (the Amendments Act) has no standing to bring an action to dismiss during the period relator's complaint is or should be under seal.

Under the provisions of the False Claims Amendments Act of 1986, a complaint brought under said act was to be held in camera for 60 days or until such time as the U. S. Attorney directed the release of the complaint.

Senator Thurmond, in Senate Report 99-345, printed July 28, 1986, referring to the False Claims Reform Act of 1985, subsequently entitled the False

Claims Amendment Act of 1986, at page 24, states:

> "Keeping the qui tam complaint under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action. Nothing in the statute, however, precludes the Government from intervening before the 60-day period expires, at which time the court would unseal the complaint and have it served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
>
> "By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way. Once the court has unsealed the complaint, the defendant will be served as required under Rule 4 of the Rules of Civil Procedure and will not be required to respond until 20 days after being served. This also corrects a current anomaly, under which the defendant may be forced to answer the complaint 2 days after

being served, without knowing whether his opponent will be a private litigant or the Federal Government. The initial 60-day sealing of the allegations has the same effect as if the qui tam relator had brought his informationto the Government and notified the Government of his intent to sue. The Government would need an opportunity to study and evaluate the information in either situation. Under this provision, the purposes of qui tam actions are balanced with law enforcement needs as the bill allows the qui tam relator to both start the judicial wheels in motion and protect his own litigative rights. If the individual who planned to bring a qui tam action did not file an action before bringing his information to the Government, nothing would preclude the Government from bringing suit first and the individual would no longer be considered a proper qui tam relator. Additionally, much of the purpose of the qui tam actions would be defeated unless the private individual is able to advance the case to litigation. The Committee feels that sealing the initial private civil false claims complaint protects both the Government and defendant's interests without

harming those of the private relator."

Since the complaint should not have been served on Xerox until after the U. S. Attorney had determined whether or not to intervene, Xerox was not entitled to make a motion for dismissal until after the Attorney General's decision.

C. Failure of the U. S. Attorney to furnish the District Court in Alexandria, Virginia with a written consent to dismissal of relator's complaint violated the Due Process Clause of the United States Constitution.

The Amendments Act clearly provides the U. S. Attorney with two methods to agree to a dismissal of a cause of action brought under the False

Claims Act. First, the U. S. Attorney may file a written consent to the dismissal with reasons for his consent. Second, the U. S. Attorney could move to dismiss the action by giving notice to the relator and an opportunity to be heard.

By failing to comply with the provisions of the False Claims Amendments Act of 1986, the petitioner /relator's right to due process under the U. S. Constitution has been violated.

D. If the False Claims Act of 1986 is to become a workable tool in the fight against fraud, a declaratory judgment from the United States Supreme Court defining the duties of the District

Courts and the U. S. Attorneys is urgently required.

In addition to the False Claims Act of 1863, Congress has enacted the following eight qui tam statutes:

> Act of September 2, 1789, 1 Stat. 65, 67 (sec. 8), now 31 U.S.C. section 155, 163, 1003 (re abuse of office by Treasurer of Secretary of Treasury);
>
> Act of March 3, 1791, 1 Stat. 199, 209 (sec. 44) (re collection of duties on liquor);
>
> Act of March 22, 1794, 1 Stat. 347, 349 (sec. 2, 4), now 46 U.S.C. section 1351-1356 (re slave trade);
>
> Act of June 30, 1834, 4 Stat. 729, 733 (sec. 27), now 25 U.S.C. section 201 (re trade and intercourse with Indian tribes);
>
> Act of August 30, 1852, 10 Stat. 61, 75 (sec. 41) re regulation of steamboats);
>
> Act of August 5, 1861, 12 Stat. 292, 296 (sec. 11) (re collectors of revenue);

Act of July 6, 1870, 16 Stat. 198, 203 (sec. 39(, later 35 U.S.C. section 50 (now repealed) [re falsely marking article as patented];

Act of February 26, 1885, 23 Stat. 332, 333 (sec. 3) [re importation of alien labor].

Only the False Claims Act has been brought forward into the twentieth century by amendments.

The following excerpts have been taken from the statement of Senator Charles E. Grassley on the False Claims Act before the House Judiciary Committee Subcommittee on Administrative Law and Governmental Relations on February 6, 1986:

". . .

"Evidence of fraud against the nation's taxpayers is on a steady rise. As with other types of crime and abuses in our society, fraud breeds a culture unto itself. It endures because the opportunity exists and because our ability to counter it

is limited by inadequate resources, experience and laws. Recent months have witnessed proliferation of fraud cases, and yet so few victories by law enforcement officers on behalf of the taxpayers.

"No one knows, of course, exactly how much public money is lost to fraud. Estimates from the General Accounting Office, Department of Justice and Inspectors General range from hundreds of millions of dollars to more than 50 billion dollars per year! Sadly, only a fraction of the fraud is reported, and an even smaller fraction of funds recovered.

". . .

"The False Claims Act has been the Government's primary weapon against fraud, yet is in desperate need of reform. A review of the current environment is sufficient proof that the Government needs help -- lots of help -- to adequately protect the Treasury against growing and increasingly sophisticated fraud. The solution calls for a solid partnership between public law enforcers and private taxpayers.

". . .

"S. 1562 promotes a concept first enacted into law by President Abraham Lincoln in 1863. Lincoln's law permits private

individuals aware of fraud to bring suit on behalf of the Government and to receive a portion of the recovery if the action is successful. The private right is aptly labeled "qui tam" which in the Latin phrase means "one who prosecutes a suit for the King as well as for himself." The original law is rooted in the realization that we cannot guard against Government fraud without the aid of private citizen informers.

"Unfortunately, when Congress amended the law in 1943, much of the Act's incentive and utility for private citizens was removed,which explains in large part the Government's impotence against fraud today.

". . .

"Pessimism about the likelihood of disclosures leading to results is not surprising in light of a 1981 General Accounting Office report which found among all Government fraud referrals, less than 40 percent were prosecuted. More recently, the Department of Defense Inspector General testified that in 1984 more than 2000 fraud investigations were completed. Yet the Justice Department successfully prosecuted in that same year just 181 cases, including only one against a Top 100 defense contractor.

". . .

"Mr. Chairman, the public, the Congress and even the Administration all recognize the magnitude of the fraud problem and its adverse impact on our nation. The Congress must act because the public demands it. Our window of opportunity is a bill endorsed by such otherwise incompatibles on this issue as the Justice Department and myself and bill's bipartisan sponsors. If we can all agree with the approach taken in S.1562, then there must surely be hope to pass on to the taxpayers in the fight against fraud. I urge this Subcommittee, Mr. Chairman, to join us in an endorsement of what can truly be an effective step forward. I appreciate your invitation and this opportunity to testify on behalf of this bill on behalf of the taxpaying citizens of our country."

VI.

CONCLUSION

For the foregoing reasons, and for each of them, Petitioner, Martin E. O'Malley respectfully prays that his Petition for a Writ of Certeriorari to review the opinion of the United States Court of Appeals be granted.

Dated: June 24, 1988

Respectfully submitted,

Martin E. O'Malley
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-3173

UNITED STATES OF AMERICA

Plaintiff

Ex rel MARTIN E. O'MALLEY;

Plaintiff - Appellant

v.

XEROX CORPORATION

Defendant - Appellee

and

LORAL ELECTRO OPTICAL SYSTEMS;
THOMAS MASON; STANLEY HARTMAN

Defendants

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge (C/A No. 87-529)

Submitted: March 29, 1988
Decided: May 9, 1988

Before RUSSELL and PHILLIPS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Martin E. O'Malley, Appellant Pro Se. Thomas Louis Patten, Latham & Watkins, for Appellee.)

PER CURIAM:

Martin O'Malley filed this qui tam action pursuant to 31 U.S.C. § 3730 contending that the defendants had conspired to defraud the United States Navy in violation of 31 U.S.C. § 3729 by improperly acquiring a Navy contract. Xerox moved to dismiss asserting that the action was barred by res judicata and the statute of limitations. O'Malley responded that pursuant to § 3730(b)(1) the action could not be dismissed without the express consent of the United States Govern-

ment. Subsequently, the Government filed a notice declining to appear.

The district court dismissed the case as barred by res judicata and the statute of limitations. O'Malley filed a timely rule 59, Fed. R. Civ. P., motion which was denied by the court. O'Malley appealed. On appeal O'Malley asserts that the district court lacked authority to dismiss his action and procedural due process rights were violated.

Finding that the district court correctly determined that the action was barred by both the statute of limitations and res judicata, we turn to the procedural questions which O'Malley presents on appeal.

O'Malley first challenges the district court's authority to dismiss the

case. Seemingly relying on 31 U.S.C. § 3730(b)(1), O'Malley asserts that:

> Defendant Xerox Corporation has no standing to bring a motion to dismiss without the written consent of the United States Attorney under the provisions of 31 U.S.C. Section 3730.
>
> Relator has standing to bring an action under 31 U.S.C. Section 3730 in the absence of actual damages to the United States Government.
>
> A District Court has no jurisdiction to dismiss a "qui tam" action brought under 31 U.S.C. Section 3730 without the consent of the United States attorney, said consent affirmatively setting forth the reasons for consent to dismiss.

O'Malley's reliance on these provisions is misplaced. Section 3730(b)(1) is intended to reach voluntary dismissals and not dismissals based upon substantive grounds. See United States ex rel. Fletcher v. Fahey, 121 F.2d 28, 29 (D.C. Cir.), cert. denied, 314 U.S. 624

(1941); United States ex rel. Laughlin v. Eicher, 56 F. Supp. 972 (D.D.C. 1944). Furthermore, "[t]he refusal of the Acting Attorney General to enter the suit may be taken as tantamount to the consent of the District Attorney to dismiss the suit. The consent of the court is obtained if the motion is sustained." Laughlin, 56 F. Supp. at 973.

O'Malley argues that "[a] District Court has no jurisdiction to hear a defendants motion to dismiss a 'qui tam' action brought under 31 U.S.C. Section 3730 if the United States Attorney has filed a written objection to the dismissal." The record clearly indicates that the Government did not object to the dismissal.

Finally, O'Malley contends that:

> Relator was deprived of his constitutional due process

> rights when the U. S. Attorney attempted to dismiss this action without filing a proper motion, without notifying relator of the motion, and when the Court dismissed the action without providing relator an opportunity for a hearing on the motion in compliance with 31 U.S.C. Section 3730(c)(2)(A).

Section 3730(c)(2)(A) is limited to the Government's dismissal of the action. There was no such dismissal in this case, but merely an election not to proceed. The records reveals that O'Malley was served with and responded to Xerox's motion to dismiss and was served with notice of the hearing on the motion to dismiss. He failed to appear, and the district court dismissed the complaint based upon the statute of limitations and res judicata defenses asserted by Xerox. There was

no violation of any notice or hearing requirement.

Accordingly, we affirm the decision of the district court. Because the facts and legal contentions are adequately developed in the materials before the Court and argument would not significantly aid the decisional process, we dispense with oral argument pursuant to Fed. R. App. P. 34 and Local Rule 34(a)

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel MARTIN E. O'MALLEY in his own behalf, Plaintiff, v. XEROX CORPORATION, etc., Defendant.	NO. CV 85-4515 AWT ORDER DISMISSING COMPLAINT

The Court has now reviewed the United States' Opposition to Dismissal of Action which was not timely filed, Local Rule 7.6, and which the Court did not actually receive until after the hearing, and the United States' Supplemental Submission, filed on October 3, 1985.

For the reasons stated at the hearing on September 30, 1985, the Court

adheres to its ruling that the complaint fails to state a claim, F. R. Civ. P. 12(b)(6). However, the Court agrees with the United States that it may be possible for relator to state a claim. Since relator is in essence alleging fraud, he should also observe the requirement of F. R. Civ. P. 9(b) that fraud must be pleaded "with particularity."

IT IS ORDERED that the complaint herein is dismissed and relator is granted 30 days within which to file and serve an amended complaint.

Dated: October 04, 1985

/s/ A. WALLACE TASHIMA
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel MARTIN E. O'MALLEY in his own behalf,	)	
Plaintiff,	)	NO. CV 85-4515 AWT
v.	)	ORDER OF DISMISSAL
XEROX CORPORATION, etc.,	)	
Defendant.	)	

This is a qui tam action under the False Claims Act, 31 U.S.C. §3730. Defendant has moved to dismiss the first amended complaint for failure to state a claim. F. R. Civ. P. 12(b)(6). In spite of leave to amend, relator has hardly clarified his position. In fact, at the hearing on the motion he took a different position than alleged in the amended pleading.

Relator's theories come to these possibilities:

1. Defendant "lowballed" its costs when submitting its cost certificates, i.e., that its true costs on the contracts were higher. Therefore, when claims in accordance with the contract price were submitted they were false because they were too low, i.e., the government should have been charged a higher price. Such a statement cannot be a material false claim under the act -- there could be no injury to the government.

2. Defendant failed to perform the "options" portion of the contract as required, forcing the government to go to other suppliers at higher cost. This may be a breach of contract. However, no claim was submitted by defen-

dant in connection with the government's payment of the higher price to the alternate suppliers.

The government has filed a second declination to prosecute this action. It also has stated that "we do object to the dismissal of the action," if the Court concludes that, as a matter of law, no claim for relief is stated. Thus the meaning and effect of 31 U.S.C. §3730(b)(1) need not be considered.

Relator's counsel was repeatedly asked whether and how he could further amend his complaint. He has stated his strongest case. Therefore, further leave to amend would be futile.

IT IS ORDERED that the action is dismissed with prejudice.

Dated: February 12, 1986

/s/ A. WALLACE TASHIMA
United States District Judge

APPENDIX D

File Jul 6 1987
Clerk, U. S. District Court
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

UNITED STATES OF AMERICA, ex rel MARTIN E. O'MALLEY, Plaintiff, v. XEROX CORPORATION; LORAL ELECTRO-OPTICAL SYSTEMS; THOMAS MASON; AND STANLEY HARTMAN, Defendants.	CIVIL ACTION, FILE NO. 87-0529-A Relator's Response to Defendants' Motion to Dismiss and for Sanctions

Under the provisions of 31 USCS 3730, the United States District Court for the Eastern District of Virginia lacks the jurisdiction to grant the relief sought by the defendants.

Section 3730 (b) (1) provides: "A person may bring a civil action for violation of Section 3729 for the person and for the United States Govern-

ment. The action shall be brought in the name of the Government. The action may be dismissed only if the court and Attorney General give written consent to the dismissal and their reasons for consenting."

If the Attorney General of the United States does not give his written consent to a dismissal and his reasons for consenting, this District lacks jurisdiction to dismiss Relator's action for any reason whatsoever.

Accordingly, Relator moves this Court for an order dismissing the Defendants' motion.

Dated: July 2, 1987

By: /s/ MARTIN E. O'MALLEY
Relator

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, ex rel MARTIN E. O'MALLEY,	)	CIVIL ACTION, FILE NO. 87-0529-A
Plaintiff,	)	
v.	)	
XEROX CORPORATION, et al.,	)	
Defendants.	)	

O R D E R

It appearing that the complaint of the plaintiff is barred by the principles of res judicata as well as the applicable statute of limitations, and that the provisions of 31 U.S.C. § 3730(b)(1) do no preclude dismissal of this action, it is hereby

ORDERED that this action is dismissed; however, the motion for sanc-

tions pursuant to F. R. Civ. P. 11 is denied.

/s/ ALBERT V. BRYAN, JR.
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 10th, 1987

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, ex rel MARTIN E. O'MALLEY, Plaintiff, v. XEROX CORPORATION, et al., Defendants.	CIVIL ACTION, FILE NO. 87-0529-A

O R D E R

Upon consideration thereof, and the court still being of the opinion that the type of dismissal granted by the United States District Court for the Central District of California on February 12, 1986, did not require the consent of the Attorney General, it is hereby

ORDERED that the plaintiff's Motion to Alter Order is denied.

/s/ ALBERT V. BRYAN, JR.
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
September 9th, 1987

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

87-3173 US v. Xerox Corporation
CA-87-529

INFORMAL BRIEF
OF AMICUS CURIAE THE UNITED STATES OF AMERICA*

*The government is not a party to this case; a notice declining to enter the appearance of the United States was filed with the District Court before the motion which is the subject of this appeal was heard.

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

Appellant asserts that 31 U.S.C. § 3730(b)(1), which provides that a qui tam action brought under the False Claims Act "may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting," deprives the District Court of jurisdiction to rule on a motion to dismiss brought under Rule 12(b)(6) F.C.R.P. for failure to state a claim upon which relief can be granted on res judicata and statute of limitation grounds, unless the Attorney General first consents to the dismissal and gives his reasons for doing so. The provision cited is applicable only to voluntary dismissals agreed to by the relator and the defendant, and not to motions to dismiss based upon substantive legal grounds.

See United States ex rel. Fletcher v. Fahey, 121 F.2d 28, 29 (D.C. Cir. 1941); United States ex rel. Laughlin v. Eicher, 56 F. Supp. 972 (D.D.C. 1944).

/s/ VINCENT B. TERLEP, JR.
U. S. Department of Justice

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel MARTIN E. O'MALLEY in his own behalf,	)	Civil Action
Plaintiff,	)	No. CV 85-4515 AWT
v.	)	(Kx)
XEROX CORPORATION, a corporation licensed to do business in California,	)	
Defendant.	)	

UNITED STATES OPPOSITION TO DISMISSAL OF ACTION

Pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(1) (the "Act"), the United States of America, by the Department of Justice, hereby notifies the Court that the Attorney General opposes the dismissal of this action as requested in the motion of defendant Xerox Corporation to dismiss for fail-

ure to state a claim upon which relief can be granted.

This is a qui tam action in which the United States declined to enter its appearance and proceed with the action, by written declination filed September 12, 1985, pursuant to 31 U.S.C. § 3730 (b)(2)(A). Therefore, the relator Martin E. O'Malley may proceed with this action.

Despite the declination of the United States, the Department of Justice continues to be involved in this litigation because of the requirement of the False Claims Act that the Attorney General give written consent to the dismissal of the action. The Act provides that a relator may proceed with the action after the Government's declination, but that "[a]n action may be

dismissed only if the court and the Attorney General give written consent and their reasons for consenting." 31 U.S.C. § 3730(b)(1).

Now pending before this Court is defendant Xerox Corporation's motion, filed August 5, 1985, to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or, in the alternative, for a more definite statement pursuant to Fed. R. Civ. P. 12(e). Since this motion seeks the dismissal of this action, we hereby submit our views on dismissal pursuant to the defendant's motion.

Defendant's motion first argues that the relator's complaint does not allege a false claim, and that a false certificate of current cost and pricing data

does not constitute a false claim. However, the motion addresses solely subsection (1) of 31 U.S.C. § 3729 in its argument that a false certificate is not a false claim. Subsection (1) applies if a person "knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of the armed force a false or fraudulent claim for payment or approval."

A separate basis for liablility under the Act is contained in subsection (2) of 31 U.S.C. § 3729 which applies when a person: "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved." Thus, if a false certificate forms the basis for claims against the Government

(for example, on invoices or progress payment requests under a contract), then the false certificate may be the basis for liability under the False Claims Act. See, e.g., United States v. Miller, 645 F.2d 473 (5th Cir. 1981); United States v. Foster Wheeler Corporation, 447 F.2d 100 (2nd Cir. 1971; United States v. Hibbs, 420 F.Supp. 1365 (E.D. Pa. 1976), vacated on other grounds, 568 F.2d 347 (3rd Cir. 1977); United States v. American Packing Corporation, 125 F.Supp. 788 (D.N.J. 1954). For these reasons, we disagree with defendant's argument that a false certificate of current cost and pricing data does not form the basis for liability under the False Claims Act.

Defendant's second argument is that the complaint should be dismissed because it does not allege any injury to the United States, citing United States v. Azzarelli Construction Co., 647 F.2d 757, 761 (7th Cir. 1981). Assuming, arguendo, that no actual monetary damage to the Government is alleged in the complaint, we believe that an action for at least one $2,000 civil penalty[1/] nonetheless is maintainable under the False Claims Act.

In Azzarelli, the Seventh Circuit acknowledged that the award of civil penalties alone is appropriate under

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1/ The number of civil penalties (formerly referred to as "forfeitures" under prior enactments of the Act) may be determined by subsequent discovery in this action.

the False Claims Act and that there need be no proof of specific damages. However, the Court went on to state that "the lack of any requirement of specific evidence of damages does not dispense with the need to establish an injury." 647 F.2d at 762. The Court relied on two Supreme Court Cases for its conclusion: United States v. Cohn, 270 U.S. 339 (1926), and Rex Trailer Co. v. United States, 350 U.S. 148, 152-53 (a956). We believe that neither case supports the conclusion of the Azzarelli Court. Cohn held the False Claims Act inapplicable because no claim was asserted against money or property of the Government, in a situation where the Government was acting as a bailee, not because of any require-

ment that the money or property, in fact, must have been impaired.

Similarly, Rex Trailer did not hold that injury was a required element of a False Claims Act action. To the contrary, the Court, citing its decision in United States ex rel Marcus v. Hess, 317 U.S. 537 (1943), affirmed the granting of forfeiture relief alone in the absence of any injury in order to provide some measure of recovery when the fact and amount of actual damages are uncertain or unmeasurable. Rex Trailer Co. v. United States, supra, at 153 and n.5. Thus, neither Cohn nor Rex Trailer support the Seventh Circuit's conclusions in Azzarelli.

To the contrary, there is significant authority from the Supreme Court and other circuit courts of appeal for

awarding civil penalties in the absence of damage to the Government. Fleming v. United States, 336 F.2d 475, 480 (10th Cir 1964), cert denied, 380 U.S. 907 (1965); United States v. Tieger, 234 F.2d 589, 590 n.4 (3rd Cir. 1956) cert. denied 352 U.S. 941; United States v. Rohleder, 157 F.2d 126 (3rd Cir. 1946).

Accordingly, without regard to whether the plaintiff has pleaded actual damage to the Government, the complaint states a claim upon which relief may be granted, because there exists a cause of action under the False Claims Act for at least one $2,000 civil penalty. For these reasons, we oppose the dismissal of the complaint.

Respectfully submitted,

/s/STEVEN J. RIEGEL
Attorney, Civil Division
Department of Justice

Dated: September 26, 1985